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IN THE

Supreme Court of the United States

WILLIAM I. KOCH; OXBOW ENERGY, INC.; SPRING CREEK ART FOUNDATION, INC.; NORTHERN TRUST COMPANY; FREDERICK R. KOCH; and THE FIDUCIARY TRUST COMPANY INTERNATIONAL,

Petitioners,

v.

KOCH INDUSTRIES, INC.; CHARLES G. KOCH; STERLING V. VARNER; DAVID H. KOCH; DONALD L. CORDES; and THOMAS M. CAREY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining whether an error in a civil case is harmless for the purposes of 28 U.S.C. § 2111, should a court use the same standard established for criminal cases in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), as eight courts of appeals have held, or should it establish a divergent and less rigorous standard for civil cases, as the Tenth Circuit and three other courts of appeals have held?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-appellants below, and petitioners in this Court, are:

> William I. Koch, Oxbow Energy, Inc., Northern Trust Company, as trustee, Spring Creek Art Foundation, Inc., Frederick R. Koch, and The Fiduciary Trust Company International, as trustee.

Plaintiffs-appellants below, and petitioners in a separately filed petition to this Court, are:

> L.B. Simmons Energy, Inc. d/b/a Rocket Oil Company, Gay A. Roane, Ann Alspaugh, Paul Anthony Andres Cox, Holly Antoinette Andres Cox Farabee, and Ronald W. Borders.

Also appearing as plaintiffs below were:

> United States Trust Company of New York, as trustee, Marjorie Simmons Gray, as trustee, Marjorie L. Simmons, as trustee, and Nationsbank, N.A., as co-trustee of the Louis Howard Andres Cox Trusts B & D.

Defendants-appellees below, and respondents in this Court, are:

> Koch Industries, Inc., Charles G. Koch, David H. Koch, Sterling V. Varner, Donald L. Cordes, and Thomas M. Carey.

CORPORATE DISCLOSURE STATEMENT

Neither Oxbow Energy, Inc., nor Spring Creek Art Foundation, Inc., have any publicly traded parents or subsidiaries. The Northern Trust Company and the Fiduciary Trust Company International are appearing solely as trustees for William I. Koch and Frederick R. Koch.

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PETITION FOR WRIT OF CERTIORARI

Petitioners William I. Koch, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

This case presents the Court with a rare opportunity to resolve a deep and intractable inter-circuit conflict concerning the proper standard of harmless error review in civil cases.

Adopting the standard established by this Court in *Kotteakos v. United States*, 328 U.S. 750 (1946) (a criminal case), a majority of circuits have held that a trial error in a civil case can be deemed "harmless" only if the court is "fairly assured" or if there is a "high probability" that the er-

ror did not influence the jury's verdict. However, a minority of circuits – beginning with the Ninth Circuit, and followed by the Seventh, Eighth, and Tenth Circuits – have expressly rejected the use in civil cases of the *Kotteakos* harmless-error standard. These circuits instead have embraced a less exacting standard by holding that a trial error in a civil case should be deemed harmless whenever it can be said that the verdict "more likely than not" would have been the same if the error had not occurred.

The panel below applied the minority view to affirm a judgment in a billion-dollar securities fraud case that was tainted by egregious evidentiary errors. Under the correct harmless-error standard followed by the majority of circuits, the judgment should be reversed.

OPINIONS BELOW

The opinions of the district court denying petitioners' motion *in limine* and a related motion for reconsideration are published as *Koch* v. *Koch Industries, Inc.*, 2 F. Supp.2d 1385 (D. Kan. 1998) and *Koch* v. *Koch Industries, Inc.*, 6 F. Supp.2d 1207 (D. Kan. 1998) and are reproduced as Appendices B & C (pages B1-B51 and C1-C13, *esp.* B9-B14, B49-B50, and C4-C10), attached hereto. The opinion of the district court denying petitioners' motion for mistrial is not published in the official reports but is available as *Koch* v. *Koch Industries, Inc.*, 1998 WL 975598 (D. Kan,. 1998) and is reproduced as Appendix D (pages D1-D12), attached hereto. The Tenth Circuit's decision affirming the district court is published as *Koch* v. *Koch Industries, Inc.*, 203 F.3d 1202 (CA11 2000), and is reproduced as Appendix A (pages A1-A70, *esp.* A37-A41), attached hereto. The Tenth Circuit's order denying rehearing and rehearing *en banc* is unpublished and is reproduced as Appendix E (pages E1-E2), attached hereto.

JURISDICTION

The Tenth Circuit issued its decision in this case on February 14, 2000 and its order denying rehearing and rehearing *en banc* on April 4, 2000. On June 23, 2000, Justice Breyer extended the time for filing a petition for certiorari to and including August 2, 2000. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1)

STATUTORY PROVISION INVOLVED

This case presents a question involving the proper standard to be used when engaging in harmless-error review pursuant to 28 U.S.C. § 2111, "Harmless Error," which provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE[1]

This is a securities-fraud case arising out of one of the most notable private securities transactions in American history. As much as $2 billion is at stake.

Respondent Koch Industries, Inc. is a privately-held integrated oil company based in Wichita, Kansas. With annual revenues of as much as $35 billion, Koch Industries currently ranks as the second largest privately-held corporation in the United States. Respondents Charles Koch and David Koch are two of the four sons of the company's founder. Charles and David currently control Koch Industries, and own substantially all of its outstanding stock. The other respondents are former corporate officers and directors.

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[1] Unless otherwise noted, the facts are taken from the Tenth Circuit and district court opinions, attached as Appendices A through D.

Petitioners William Koch and Frederick Koch are the other two of the four sons of the company's founder. Until 1983, petitioners collectively owned 48% of the company's stock.[2] The other 52% of the company's stock was controlled by respondents Charles Koch and David Koch.

In 1983, respondents bought out petitioners' 48% interest in Koch Industries for $1.1 billion. After the buyout, petitioners discovered information indicating that respondents had made false representations concerning the value of the company's assets and its financial condition.

Petitioners brought suit in the United States District Court for the District of Kansas under sections 10(b) and 20(a) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and for fraud, breach of warranty, and breach of fiduciary duty. Jurisdiction in the district court was based upon 28 U.S.C. §§ 1331, 1332, and 1367.

In 1998, the case was tried to a jury. At trial, respondents defended themselves, in part, by falsely portraying petitioner William Koch, the lead plaintiff and the plaintiffs' most important witness, as a greedy, litigious villain. In support of this "defense," respondents introduced misleading and highly prejudicial evidence of other, unrelated litigation between the parties, including evidence that William and Frederick Koch even "sued their own mother."

Respondents' conduct at trial was expressly permitted, over petitioners' objections, by the district court. Prior to trial, petitioners filed a motion *in limine* to exclude the evidence of unrelated litigation. The district court denied the motion. It concluded that such evidence, including evidence of the lawsuit involving William Koch's mother, was "central" to respondents' case. App. B12. The district court fur-

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[2] This figure includes stock formerly owned by members of the Simmons family, who have filed a separate petition for certiorari.

ther noted that the exclusion of this evidence would "eviscerate" respondents' defense. App. B12.[3]

At trial, petitioners objected to the prejudicial demonization of William and Frederick Koch at every opportunity. Petitioners objected during the relevant portion of respondents' opening statements to the jury, and again when the evidence was admitted during the cross-examination of petitioner William Koch. After the evidence was admitted, petitioners moved for a mistrial. The district court overruled the objections, and denied the motion for mistrial.

At the conclusion of the trial, the jury found that the defendants did in fact make misrepresentations and/or omissions in connection with the buyout. However, the jury awarded no damages. App. A7.

Petitioners appealed to the Tenth Circuit, pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed. Although the court expressly found that the inflammatory evidence was "not relevant" and that "the district court erred in admitting it," App. A41, it held that the error was harmless.

Restating the law of the circuit concerning harmless-error-review, the panel stated that "[the Tenth Circuit] deems such wrongly admitted evidence prejudicial only if we reasonably conclude that the jury would have reached a different result without that evidence." App. A41. The panel then remarked that it was not convinced "that the jury would have found for the [petitioners] had it not learned of these other lawsuits." *Id.*

Petitioners sought rehearing and rehearing *en banc* on this issue. The petition expressly argued that the panel decision

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[3] In response to a motion for reconsideration, the district court made matters even worse. The court ruled that the respondents could admit superficial information about the unrelated lawsuits (*i.e.*, that William Koch sued his brothers on several other occasions and that William and Frederick Koch even "sued their own mother"), but that petitioners could not respond by explaining the underlying merits or details of those lawsuits.

exacerbated an existing inter-circuit conflict on the civil harmless-error standard. The Tenth Circuit denied rehearing and rehearing *en banc* without comment.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Tenth Circuit's decision applying the "probable-harm" standard for whether an error in a civil case requires reversal conflicts with the "significant-possibility-of-harm" standard applied by eight other circuit courts of appeals. The question presented raises an important national issue potentially affecting every single civil case filed or reviewed in the federal courts.

Although this Court has addressed the appropriate standard of harmless-error review in the criminal and habeas contexts, it has never defined the harmless-error standard in a civil case. The result is a festering inter-circuit split on a fundamental issue of federal court procedure – the degree of certainty a court must have in order to disregard an error as "harmless." This case presents an opportune vehicle with which to resolve this important issue affecting the quality of civil justice throughout the country.

I. THERE IS AN INTRACTABLE 8-4 SPLIT OVER THE STANDARD FOR HARMLESS ERROR IN CIVIL CASES.

In *Kotteakos* v. *United States*, this Court set forth the standard to be followed by appellate courts in determining whether a trial error should be deemed harmless The Court explained:

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand .... But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment

> was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

328 U.S. at 764-65; *see id.* at 776 (error not harmless if it had "substantial and injurious effect or influence" upon the jury).

Kotteakos was a criminal case. However, because the harmless-error statute, currently codified at 28 U.S.C. § 2111, applies equally to civil and criminal cases, eight courts of appeals – the First, Second, Third, Fourth, Fifth, Sixth, Eleventh, and D.C. Circuits – have held that the standard set forth in *Kotteakos* should also be employed in civil cases. *See Lataille v. Ponte*, 754 F.2d 33, 37 (CA1 1985) (applying Kotteakos standard of whether court can say "with fair assurance … that the judgment was not substantially swayed by the error"); *Cohen v. Franchard Corp.*, 478 F.2d 115, 125 (CA2) (same), *cert. denied,* 414 U.S. 857 (1973); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 923-28 (CA3 1985) (*Kotteakos* standard applies in both criminal and civil cases, *i.e.*, errors "are not harmless unless it is 'highly probable' that they did not affect a party's substantial rights"); *Glass v. Philadelphia Elec. Co.*, 34 F.3d 188, 191 (CA3 1994) ("error is harmless only 'if it is highly probable that the error did not affect the outcome of the case.'"); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 235 (CA4 1999) (adopting *Kotteakos* test of "'whether the error itself had substantial influence'"), *cert. denied,* -- U.S. --, 120 S. Ct. 1243 (2000); *Howard v. Gonzales*, 658 F.2d 352, 357 (CA5 Unit A 1981) (applying *Kotteakos* standard that if, "in the reviewing court's conviction the error did not influence the jury or had but very slight effect, the error is harmless"); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 157 (CA6 1988) (adopting *Kotteakos* standard as applied by the D.C. Circuit); *Aetna Cas. & Surety*

Co. v. Gosdin, 803 F.2d 1153, 1159 (CA11 1986) ("in civil cases courts should apply the same standard as announced in *Kotteakos*"); *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (CADC 1990) (applying *Kotteakos* substantial influence test); *Jordan v. Medley*, 711 F.2d 211, 219 n. 6 (CADC 1983) (Scalia, J.) (*Kotteakos* standard "is used by this court and others to determine effect upon 'substantial rights' in civil cases").

The Seventh, Eighth, Ninth, and Tenth Circuits, however, do not apply *Kotteakos* in civil cases, but instead apply a less rigorous civil harmless-error standard that requires reversal only if the error "more probably than not" altered the result in the case. *Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1458-59 (CA9 1983) (rejecting a "possibly influenced" standard applied in criminal cases and holding that "an error in a civil trial need only be more probably than not harmless"); *see also Smith* v. *Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 389 (CA7 1985) (applying more-probable-than-not standard); *McIlroy v. Dittmer*, 732 F.2d 98, 105 (CA8 1984) ("jury would more probably than not still have reached the same result," citing Ninth Circuit standard); *United States Indus.* v. *Touche Ross & Co.*, 854 F.2d 1223, 1252-53 n. 39 (CA10 1988) (rejecting the *Kotteakos* standard and instead asking "whether the substantial rights of the parties were more probably than not unaffected by the error"), *impliedly overruled on other grounds as recognized in Suiter* v. *Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1288 (CA10 1998).

The Tenth Circuit in this case applied its established harmless-error standard, asking whether the "jury would have reached a different result." App. A41. As the Tenth Circuit has previously recognized, *United States Indus.*, 854 F.2d at 1252-53 n. 39, that standard conflicts with the *Kotteakos* sub-

stantial-influence standard applied in the majority of the circuits on the opposite side of the issue.[4]

This well-developed split has no realistic prospect of resolving itself. Courts on both sides of the issue have acknowledged the existence of the split and have expressly disagreed with their sister circuits on the opposite side.

On the majority side of the split, the D.C. Circuit has observed that it is "well aware that the circuits are divided on the appropriate standard of review to apply in gauging the effect of an error in a civil case." *Williams*, 920 F.2d at 1023. Likewise, in the most recent addition to the majority view, the *en banc* Fourth Circuit in *Taylor v. Virginia Union University* collected cases, expressly joined the majority of circuits in applying the *Kotteakos* standard to civil cases, and recognized that a minority of circuits "have refused to apply the *Kotteakos* standard in the civil context." 193 F.3d at 235 & n. 10. On the minority side of the split, the Tenth Circuit likewise has held firm despite having "recognize[d] that the circuits are divided on the appropriate standard of review to apply in

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[4] Beyond the primary split on the substance of the harmless-error standard, there is a related split over who bears the risk of uncertainty or doubt as to whether an error is harmless. Justice Thomas, dissenting in *O'Neal*, has recognized the existence of this further split as to the "burden of showing prejudice" in a civil appeal. *O'Neal*, 513 U.S. at 450 (Thomas, J., dissenting); *compare Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1241 (CA10 1999) (allocating "risk of doubt" as to harmlessness to appellant); *Hygh* v. *Jacobs,* 961 F.2d 359, 365 (CA2 1992) ("burden of demonstrating prejudice requiring reversal rests with the party asserting error"); *Smith* v. *Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (CA5 1990) (*per curiam*) ("party asserting error has the burden of proving that the error prejudiced a substantial right"); *United States* v. *Killough*, 848 F.2d 1523, 1527 (CA11 1988) (same); *and Flanigan* v. *Burlington Northern Inc.*, 632 F.2d 880, 889 (CA8 1980) ("it is the appellant's burden to establish the prejudicial effect"), *cert. denied*, 450 U.S. 921 (1981), *with Ahern* v. *Scholz*, 85 F.3d 774, 786 (CA1 1996) (grave doubt as to effect treated as harmful); *Barth* v. *Gelb*, 2 F.3d 1180, 1188 (CADC 1993) (same), *cert. denied*, 511 U.S. 1030 (1994).

gauging the effect of an error in a civil case." *United States Indus.*, 854 F.2d at 1252-53 n. 39.

Thus, notwithstanding the recognized opposing views of the other circuits, courts on both sides have continued to hold to those opposing views as to whether the *Kotteakos* standard applies in both civil and criminal cases. Indeed, the Tenth Circuit, from which this case arises, had long ago aligned itself with the minority view of the Seventh, Eighth, and Ninth Circuits and there is no reason to believe that it will revisit that choice, as corroborated by its denial of rehearing *en banc* in this case. App. E1. *See also Aetna*, 803 F.2d at 1160 n. 13 (CA11) (recognizing split); *McQueeny*, 779 F.2d at 925-27 (CA3) (extensively analyzing and expressly rejecting less stringent standard from Eighth and Ninth Circuits); *cf. Haddad,* 720 F.2d at 1458-59 & nn. 6-7 (CA9) (noting distinguished commentary on alternative harmless-error standards and nonetheless rejecting unified standard for civil and criminal cases). There is no indication that these courts of appeals will alter their long-held views without controlling direction from this Court.

The need for this Court to resolve this split expressly and decisively is demonstrated by the persistence of the split even after this Court's decision in *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). *O'Neal* contains strong language in support of the majority position. This Court wrote in *O'Neal* that "civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." 513 U.S. at 441. The significance of the *O'Neal* case for the merits of this petition will be discussed in the following section; what is important regarding the circuit split, however, is that the Tenth Circuit and other courts in the minority continue to apply a less stringent standard despite the highly significant language from *O'Neal*. *See Kennedy* v. *Southern California Edison Co.*, -- F.3d --, --, 2000 WL 991836, at *9 (CA9 2000) (harmless-error review in a civil case asks whether the "'error is more probably than

not harmless,'" and "is 'less stringent' than review for harmless error in a criminal case") (citations omitted); *cf. ATD Corp.* v. *Lydall, Inc.*, 159 F.3d 534, 549 (CA Fed.1998) (post-*O'Neal* case noting the split and the use of the different "more probable than not" standard by the Seventh, Eighth, Ninth, and Tenth Circuits). There is thus no realistic prospect of the split resolving itself without this Court's intervention.

II. THE TENTH CIRCUIT'S PROBABLE-CHANGE-IN-OUTCOME TEST CONFLICTS WITH THIS COURT'S CASES INTERPRETING THE HARMLESS-ERROR STATUTE, 28 U.S.C. § 2111.

In becoming the most recent circuit to join the majority view regarding harmless error, the *en banc* Fourth Circuit succinctly summarized the merits of applying the *Kotteakos* standard in civil cases:

> [W]e can fathom no sound justification for using a different test for determining whether a lower court's error affected an appellant's substantial rights in the civil context as compared to the criminal context. Indeed, by its own terms, § 2111 makes no distinction between civil and criminal cases, thereby implying that Congress intended uniform treatment of the statute's language in the civil and criminal contexts.

Taylor, 193 F.3d at 235. Not only does this view make sense as a construction of § 2111, it finds substantial support in this Court's cases interpreting the harmless-error statute.

Over 50 years ago in *Kotteakos* itself, this Court observed regarding § 2111's predecessor that the "statute in terms makes no distinction between civil and criminal causes." *Kotteakos*, 328 U.S. at 762. And in discussing the statute, the Court cited to Federal Rule of *Civil* Procedure 61, as well as to various criminal rules. *Id.* at 757 n. 9. Twenty years later in *Chapman* v. *California*, 386 U.S. 18, 22 n. 5 (1967), the Court again cited to Federal Rule of Civil Procedure 61, even though discussing § 2111 in the context of a criminal case.

More recently in a civil case, this Court addressed generally the application of the harmless-error statute in a civil case, but did not clearly state a particular formulation of that standard. *McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548 (1984). What the *McDonough* Court did do, however, was repeatedly cite to *Kotteakos* without any indication that that criminal decision was inapplicable in the civil context. *Id.* at 553-54. It also characterized harmless error as mere "abstract imperfection," while holding that the inability to challenge a juror for cause would warrant a new trial without any suggestion that the litigant need further show a probable different result had the juror been challenged. *Id.* at 556.

Most recently in *O'Neal*, a habeas case addressing who bears the risk of uncertainty whether an error is harmless, this Court observed that "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." 513 U.S. at 441. Discussing *Kotteakos* and its construction of the predecessor to § 2111, the Court further noted, as *Kotteakos* had a half-century before, that the "statute, by its terms, applied to both civil and criminal cases." *Id.*

The *O'Neal* Court observed that "the current harmless-error sections of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (which use nearly identical language) both refer to" the predecessor to § 2111 as their statutory source. The Court further explained that:

> [E]ven if, for argument's sake, we were to assume that the civil standard for judging harmlessness applies to habeas proceedings (despite the fact that they review errors in state criminal trials), it would make no difference with respect to the matter before us. For relevant authority rather clearly indicates that, either way, the courts should treat similarly the matter of "grave doubt" regarding the harmlessness of errors affecting substantial rights, and as *Kotteakos* provides.

O'Neal, 513 U.S. at 441-42.

This Court's various considerations of the harmless-error statute, although yet to provide a definitive statement of the correct standard in the civil context, strongly support the majority view that the *Kotteakos* standard applies in both civil and criminal cases. The standard applied by the Tenth Circuit in this case, and by the other circuits in the minority, thus constitutes an erroneous interpretation of § 2111 warranting a grant of certiorari to enable this Court to establish a uniform and correct interpretation of that statute.

III. THE HARMLESS-ERROR STANDARD IN CIVIL CASES PRESENTS AN IMPORTANT NATIONAL QUESTION REQUIRING RESOLUTION BY THIS COURT.

The proper standard for harmless-error review in civil cases raises an important national issue requiring resolution by this Court. The standard potentially comes into play in virtually all of the civil cases filed each year. Indeed, a Westlaw search demonstrates that "harmless error" was discussed in approximately 427 opinions in civil cases in 1999, and has already been discussed in approximately 244 opinions in 2000.[5]

The question also arises in all manner of civil cases, from diversity actions involving contracts and torts, to federal question cases involving securities law and civil rights. *See, e.g., Williams*, 920 F.2d at 1020 (diversity case alleging neg-

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[5] The harmless-error standard under § 2111 also, as a practical matter, determines the harmless-error standard applied in district courts under Federal Rule of Civil Procedure 61. *See McDonough Power Equip.* v. *Greenwood*, 464 U.S. 548, 554 (1984) (harmless-error statute applicable to appellate courts, "incorporates the same principle as that found in Rule 61"); *McQueeny*, 779 F.2d at 923 n. 10 ("Although in this discussion we will often speak of the appellate court's standard of review, our discussion is also relevant to the trial court's harmless error analysis on consideration of post-trial motions."). As a result, the split over the appellate standard for harmless error also affects numerous cases and rulings that may never even reach the courts of appeal.

ligent infliction of emotional distress); *United States Indus.*, 854 F.2d at 1226 (federal securities case with various pendant state claims); *Lataille*, 754 F.2d at 34 (§ 1983 civil rights action). Given the great volume and topical breadth of cases affected by the harmless-error standard, it is all the more important that the law defining that standard be uniform throughout the country.[6]

At bottom, the standard of harmless-error review applied by the courts of appeals has a profound effect on the very quality of civil justice in the federal courts. If the majority of circuits are correct in holding that an error can be deemed harmless only if there is a high probability that the error did not affect the judgment, then the thousands of plaintiffs and defendants who are forced to litigate in the Seventh, Eighth, Ninth, and Tenth Circuits are being denied a sufficiently accurate and reliable determination of their rights and liabilities. This case thus presents an important question for the administration of civil justice in the federal courts that can only be resolved by this Court. *Cf. Kotteakos*, 328 U.S. at 752 ("We granted certiorari because of the importance of the question for the administration of criminal justice in the federal courts.").

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE INTER-CIRCUIT CONFLICT.

The tremendous financial stakes in this litigation give the parties an obvious incentive to brief the competing views on this issue vigorously and thoroughly. Both sides are also well-represented by experienced counsel familiar with federal court procedure and with Supreme Court practice. Perhaps

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[6] Consistency and uniformity in this area also have "certain administrative virtues" that "[i]n a highly technical area such as this one" will bring "simplicity, a body of existing case law available for consultation, ... and a consequently diminished risk of further, error-produced, proceedings." *O'Neal*, 513 U.S. at 443.

most importantly, the split is squarely and meaningfully presented by this case.

The evidence that was improperly admitted by the district court included the following: (1) that William and Frederick Koch had sued Charles and David on several other occasions; (2) that William and Frederick had even "sued their own mother" over a family foundation; (3) that William Koch had "greatly upset his mother by subpoenaing her into court"; (4) that the foundation lawsuit left their late mother so "broken hearted" that she disinherited them; (5) that William and Frederick then challenged their late mother's will; (6) and that the court found against William and Frederick "on every issue" in the will contest case. App. A38; Trial Transcript Vol. T1, at 354-55; Trial Transcript Vol. T4, at 2723-24.

The potential impact of this improperly admitted evidence cannot be understated. A juror need only hear once that the plaintiffs "sued their own mother" to be hopelessly prejudiced against them. Indeed, in denying petitioners' pretrial motion *in limine* to exclude this evidence, the district court itself concluded that it was "central" to respondents' case and that their defense would be "eviscerate[d]" without it. App. B12.

If the standard set forth by this Court in *Kotteakos* were to be applied in this case, reversal would be necessary. It cannot be said "with fair assurance" that the erroneous introduction of this inflammatory evidence did not have "a substantial and injurious effect or influence" in determining the jury's verdict. Only by invoking Tenth Circuit authority rejecting *Kotteakos* and applying a far less exacting standard of review did the panel below justify affirming despite the district court's error.

The panel below offered no alternative rationale for affirming the district court. If this Court concludes that the majority of circuits are correct in applying the *Kotteakos* standard in civil cases, the Tenth Circuit's judgment in this case must be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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